



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Sandy S.,¹
Complainant,

v.

William Kilbride,
Chair,
Tennessee Valley Authority,
Agency.

Appeal No. 2023000930

Agency No. TVA-2021-0026

DECISION

On November 29, 2022, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's October 28, 2022, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

Whether Complainant's appeal was timely and whether Complainant was subjected to discrimination due to his age and reprisal when he was not selected for a Supervisor position.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Mechanical Maintenance Instructor at the Agency's Browns Ferry Nuclear Plant in Athens, Alabama.

On November 10, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of age (YOB: 1960) and reprisal for protected EEO activity under the Age Discrimination in Employment Act of 1967 when:

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

1. on July 12, 2021, he learned that he was not selected for a Supervisor, Maintenance position at Browns Ferry Nuclear Plant on Job #510971.

Complainant stated that he applied for the Supervisor position in February 2021 and was selected for an interview. See Report of Investigation (ROI) at 78-79. He asserted that he thought the interview went well because two of the interviewers already knew him and what kind of work he did and all the interviewers were writing down his answers. See ROI at 82. He was told that two people would be hired for the position at the time and later found out that one person was hired and the position then posted externally. See ROI at 83. He stated that the Selectee was only training to be a level two maintenance worker while he himself was already a level three maintenance worker. See ROI at 83-84. He asserted that he was upset when he heard that the position had been posted externally so he contacted HR and they told him to contact management, which he did. See ROI at 85-87. He stated that he met with two of the interviewers on July 22 and was told that he had not interviewed well enough. See ROI at 87. He stated that he later talked to the Plant Vice President (Vice President) on August 5, who showed him the grading for the interview and Complainant saw that he had been ranked five points behind the top two candidates and when the highest-ranked candidate turned the offer down, that left the eventual Selectee and Complainant who should have been selected but instead they did not select Complainant but posted the position externally. See ROI at 88. He asserted that when he met with the Vice President, the Vice President asked him at that time to take the Supervisor position and when Complainant asked if there would be any retaliation, the Vice President answered that usually there were only two ways to get fired, by cheating and lying, but didn't outright guarantee no retaliation. See ROI at 89-90. Complainant stated that when he asked the Maintenance Mechanic Superintendent (Superintendent) if the Superintendent wanted Complainant to be a Supervisor and the Superintendent said "no," Complainant refused the offer to be a Supervisor because he was afraid of being retaliated against. See ROI at 91-93.

The Superintendent, who was in charge of posting the position, explained that usually, a position is posted internally first and anyone who is interested can apply. See ROI at 116. He asserted that for the Supervisor position at issue, about six people applied and after HR reviewed the resumes, the applications were sent back to him, and he selected the people he wanted to have interviewed. See ROI at 116-117. He stated that one person dropped out so that left five people who were interviewed, and he selected the interview panel and decided what questions to ask in the interview. See ROI at 117. He stated that he decided on a cutoff number of 70 for the interview score, which consisted of a consensus score reached by all three members of the interview panel grading each applicants' answers to each question from 1 to 5. See ROI at 118-119. He and the other two interview panelists all agreed that Complainant did not interview well, that he did not make eye contact and his answers were not very thorough, forcing the panelists to ask follow-up questions and generally expecting the panelists to simply give him credit for their past knowledge of Complainant's work rather than actually answering the questions completely. See ROI at 119-22; 166-67; 183-84. He stated that Complainant scored a 65 on the interview. See ROI at 121.

The Superintendent and one of the interview panelists explained that afterwards, they met with Complainant to provide feedback about why he had not been selected and in the feedback meeting, Complainant gave the sort of responses that they had been looking for in the first interview and so afterwards, the Superintendent talked to management and decided to offer Complainant a Supervisor position. See ROI at 124-25; 186-87. The Superintendent explained that he talked to HR and the Vice President and was told that because there were only five internal candidates, if he did not find what he was looking for internally, he could post the position externally. See ROI at 126. He stated that he did not interview or hire anyone through the second external posting until after he had decided to offer Complainant a Supervisor position after the second feedback meeting and Complainant had refused the offer. See ROI at 126-27.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision found that the Agency articulated legitimate, nondiscriminatory reasons for the non-selection and Complainant did not establish that the Agency's reasons were a pretext for discrimination. The decision therefore concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

CONTENTIONS ON APPEAL

Complainant appealed, stating that he believed favoritism was the basis for the decision because he later found out that the Selectee went to high school with the former site Vice President and asserting that the Agency has a history of hiring based on favoritism and the "buddy system."

In response, the Agency contends first that the appeal should be dismissed as untimely and, in the alternative, on the merits, that there is no evidence to support Complainant's assertions of discrimination.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

Timeliness of the Appeal

We will first address the Agency's argument that Complainant's appeal should be dismissed as untimely. Appeals to the Commission must be filed within 30 calendar days after Complainant receives notice of the Agency's final action, pursuant to 29 C.F.R. § 1614.402(a). The Agency emailed the final decision to Complainant on October 28, 2022, and Complainant does not dispute that he received the Agency's final decision on that date. As the 30-day time limit for Complainant to file a timely appeal fell on Sunday, November 27, 2022, pursuant to 29 C.F.R. §1614.604, Complainant had until Monday, November 28, 2022 to file a timely appeal. This appeal was filed on November 29, 2022.

The evidence indicates, however, that Complainant emailed the Agency's EEO director on November 28, 2022, informing the EEO director that he wished to appeal the Agency's decision. Because the Agency was informed in a timely manner of Complainant's appeal, the Agency has not been prejudiced by the untimely filing by a single day of Complainant's appeal and under these circumstances, we exercise our discretion and accept Complainant's appeal. See Foster W. v. U.S. Postal Serv., EEOC Appeal No. 2020003786 (April 5, 2021).

Disparate Treatment

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

We find that the Agency articulated legitimate, nondiscriminatory reasons for the non-selection. All three of the interview panelists agreed that Complainant did not interview very well, not giving complete answers and not meeting the panelists' eyes. See ROI at 119-22; 166-67; 183-84. One of the interview panelists specifically stated that Complainant did not provide detailed or thorough answers, tending to merely say that the interviewers already knew what kind of work he can do, but he explained that was not appropriate because in an interview, the level of prior familiarity with an applicant can't be assumed to matter and one must still answer all the questions and attempt to "sell yourself," to explain why the person would be beneficial to the Agency in the role. See ROI at 183-86.

We find that Complainant did not establish that the Agency's reasons are a pretext for discrimination.² Complainant's primary argument is limited to contending that the Selectee was not as well-qualified as he is and disputing that his body language during the interview was bad because he asserted that the interview panelists were writing down answers and were, therefore, not looking at him. Complainant cannot establish pretext based solely upon his subjective assessment of how his interview went or his own qualifications. See Palmer N. v. Dep't of Defense, EEOC Appeal No. 0120140070 (March 18, 2016). Moreover, the Commission has long held that a person's length of experience does not necessarily mean he is better qualified. See Macready v. Dep't of Justice, EEOC Appeal No. 01991433 (Apr. 4, 2002). To the extent Complainant argues that the Selectee was pre-selected or that the Selectee was chosen based on favoritism, we note that there is no evidence of pre-selection but even so, neither pre-selection nor favoritism are violations of EEO statutes. See Billy L. v. Dep't of Homeland Sec'y, EEOC Appeal No. 2022004180 (stating that even if pre-selection occurred, pre-selection on its own is not unlawful); Sierra-Barber v. Dep't of Interior, EEOC Appeal No. 0120055126 (Jan. 31, 2007) (allegations of nepotism and favoritism do not violate EEO statutes). There is no evidence in the record to support Complainant's assertions of discriminatory animus. The Commission has repeatedly stated that mere assertions or conjecture that an agency's explanation is a pretext for intentional discrimination is insufficient because subjective belief, however genuine, does not constitute evidence of pretext. See McKinley P. v. Dep't of Defense, EEOC Appeal No. 2021005017 (Nov. 7, 2022); Ricardo K. v. Dep't of Veterans Affs., EEOC Appeal No. 2021002826 (Aug. 10, 2022). Finally, the Commission will not second-guess the business judgment of Agency officials regarding personnel decisions absent evidence of some discriminatory motive, which is not present here. See Billi D. v. Dep't of Justice, EEOC Appeal No. 0120170193 (Sept. 12, 2017).

² We note that Complainant has not established a prima facie case of reprisal because he himself admitted that he had not engaged in any EEO activity prior to this nonselection, see ROI at 93-94, and could only state that he asked management if there would be any retaliation if he accepted the offer and the Superintendent stated that he would not retaliate against Complainant, which Complainant interpreted to mean that other supervisors who report to the Superintendent might retaliate against Complainant. This occurred after the non-selection and as such, does not establish a prima facie case.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision finding that Complainant did not establish that he was subjected to discrimination as alleged.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

January 24, 2024
Date